Quantum Far East (M) Sdn Bhd v Kayla Beverly Hills Malaysian Sdn Bhd

HIGH COURT (KUALA LUMPUR) WINDING-UP NO D4-28-172 OF 2002
ABDUL MALIK ISHAK J
14 NOVEMBER 2003

Civil Procedure — Stay of proceedings — Bankruptcy proceedings — Whether hearing of winding-up petition be stayed pending appeal to Court of Appeal

This was a winding-up petition by the petitioner pursuant to a summary judgment obtained against the respondent. Contending that they had a counter-claim, the respondent applied for and obtained a stay order against that judgment pending their appeal to the Court of Appeal. The issue before this court was whether the winding-up petition be dismissed with costs or be stayed in view of the said stay order or, whether it should be allowed to proceed notwithstanding the appeal to the Court of Appeal and that it should not be struck off nor stayed.

Held, allowing the petition to be heard:

(1) In order to stay the present winding-up proceedings, there must be an application made to this court by way of an originating motion by the respondent and the petitioner should be given the right to challenge it, which was not done. Section 222 of the Companies Act 1965 does not permit a stay of the winding-up proceedings as it is done only after the order for winding-up has been made by the court. That the stay order was granted by another division of this court has no bearing to the current proceedings (see paras 5 and 9).

(2) The respondent's counter-claim was not in the nature of a set-off but rather it was an independent transaction which did not amount to a defence to the petitioner's claim (see para 10).

(3) Notwithstanding the stay order of execution of the judgment, the present winding-up petition which is founded on the judgment which has been stayed would be heard by this court (see para 12).

[**Bahasa Malaysia summary**

Ini adalah satu petisyen penggulungan oleh pempetisyen berasaskan satu penghakiman terus yang didapatkan terhadap responden. Sambil mengadu bahawa mereka mempunyai tuntutan balas, responden memohon dan telah mendapatkan perintah penggantungan terhadap keputusan itu sambil menunggu rayuan mereka ke Mahkamah Rayuan. Isu di hadapan mahkamah ini adalah sama ada petisyen penggulungan berkenaan harus dibatalkan dengan kos atau digantungkan berpandukan perintah penggantungan atau, sama ada ia boleh diteruskan walaupun rayuan berkenaan ke Mahkamah Rayuan dan ia tidak patut dibatalkan atau digantungkan.

Diputuskan, membenarkan petisyen dibicarakan:

(1) Untuk menggantungkan prosiding penggulungan semasa, harus ada saut permohonan dibuat ke mahkamah ini melalui saman pemula oleh responden dan pempetisyen harus diberi hak untuk mencabarnya, yang tidak dibuat. Seksyen 222 Akta Syarikat 1965 tidak membenarkan penggantungan prosiding penggulungan kerana ia hanya boleh dibuat selepas perintah penggulungan dibuat oleh mahkamah. Bahawa perintah penggantungan dibenarkan oleh cabang lain mahkamah ini tidak mempunyai kesan terhadap prosiding semasa (lihat perenggan 5 dan 9).

(2) Tuntutan balas responden tidak berupa suatu tolakan tetapi ianya adalah satu transaksi yang berasingan yang tidak merupakan pembelaan kepada tuntutan pempetisyen (lihat perenggan 10).

(3) Walau apa pun perintah penggantungan penghakiman wujud, petisyen penggulungan semasa yang berasaskan penghakiman yang digantungkan akan dibicarakan oleh mahkamah ini (lihat perenggan 12).

Notes

For cases on stay of bankruptcy proceedings, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5537–5540

Cases referred to

Banfoong Sydney (M) Sdn Bhd v MIFC Credit & Leasing Sdn Bhd [1990] 2 MLJ 120 (refd)

Bank Utama (Malaysia) Bhd v GKM Amal Bhd [2000] 5 MLJ 657 (refd)

Harpers Trading (M) Sdn Bhd v Davids Distribution Sdn Bhd [2000] 5 MLJ 334 (refd)

Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals [2001] 4 MLJ 187 (refd)

Patel Holding Sdn Bhd v Estet Pekebun Kecil Sdn Bhd & Anor [1990] 2 CLJ 280 (refd)

Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd [1985] 1 MLJ 157 (refd)

Shing Hup Hin Construction Sdn Bhd [1999] 1 MLJ 167 (refd)

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1991] 3 MLJ 325 (refd)

Legislation referred to

Companies Act 1965 s 221, 222, 243, 243(1)

Companies (Winding-Up) Rules 1972

SY Liew (Shearn Delamore) for the petitioner

P S Gill (Gill & Tang) for the respondent

Abdul Malik Ishak J:

Brief Facts of the Case

[1] The winding-up petition herein was based on the judgment dated 25 June 2001 that was granted by the Kuala Lumpur High Court vide suit no: D5-22-1711-2000 between the same parties herein ('the D5 suit'). The chronology of events may be summarised in this fashion:

(1) Summary judgment was handed down by the learned senior assistant registrar ('SAR') on 25 June 2001 for part of the petitioner's claim amounting to the sum of RM567,000 ('the Judgment') in the D5 suit.

(2) An appeal was filed by the respondent to the Judge in Chambers against the SAR's decision and the learned Judge dismissed this appeal on 15 October 2001.

(3) The respondent being aggrieved then appealed to the Court of Appeal vide Court of Appeal Civil Appeal No W-02-968-2001.

(4) The respondent subsequently applied in the D5 court for a stay of execution of the judgment pending the hearing and determination of the appeal to the Court of Appeal. This stay of execution pending the appeal was granted by the D5 court on 20 February 2003 ('the D5 stay order').

(5) In the D5 suit, the respondent has a counterclaim.

The Questions Posed

[2] Should the winding-up petition be dismissed with costs or be stayed in view of the D5 stay order or should it be allowed to proceed notwithstanding the appeal to the Court of Appeal, and that it should not be struck off nor stayed. To put it bluntly, what is the effect of the D5 stay order of execution of the judgment on the present winding-up petition which is founded on that judgment which has been stayed?

Arguments of the Parties

[3] Mr SY Liew, the learned counsel for the petitioner, argued that this court should proceed with the present winding-up petition and should not be concerned with the D5 stay order. Mr PS Gill, the learned counsel for the respondent, urged this court to forthwith dismiss the present winding-up petition with costs.

The Decision of the Court

[4] A stay of execution of the judgment in the D5 suit is not a stay of the winding-up proceedings because the petition for winding-up is not an execution. In *Maril-Rionebel (M) Sdn Bhd & Anor v Perdana Merchant Bankers Bhd and other appeals* [2001] 4 MLJ 187, the Court of Appeal speaking through Gopal Sri Ram JCA (who wrote a separate judgment), aptly said at p 198 of the report:

> But a petition for winding-up is not execution, for a winding-up petition is not based upon any judgment of a court. Normally, it is based on the inability of a company to pay its debts as and when they fall due. Such inability is normally evidenced by the company's inability to satisfy or compound a notice of demand issued pursuant to s 218 of the Act.

[5] In order to stay the present winding-up proceedings, there must be an application made to this court by way of an originating motion by the respondent and the petitioner should be given the right to challenge it. Here, the respondent has not applied to this court for a stay of the winding-up petition. But the respondent saw fit to apply for the stay of execution of the judgment in the D5 suit. Here too the respondent has filed its affidavits in opposition to the winding-up petition under the Companies (Winding-Up) Rules 1972. Under s 221 of the Companies Act 1965, the court is given very wide powers at the hearing of the winding-up petition to dismiss it with or without costs or adjourn the hearing conditionally or unconditionally or make an interim or other order that the court thinks fit. I am of the considered view that a stay of the winding-up proceedings is not permitted under s 222 of the Companies Act 1965. The power to stay a winding-up is provided for under s 243 of the Companies Act 1965 and it is done only after the order for winding-up has been made by the court (*Harpers Trading (M) Sdn Bhd v Davids Distribution Sdn Bhd* [2000] 5 MLJ 334; and *Shing Hup Hin Construction Sdn Bhd* [1999] 1 MLJ 167). And the application for a stay under s 243 of the Companies Act, 1965 may only be made by the liquidator or any creditor or contributory. Upon an application under s 243(1) of the Companies Act 1965, the court may order the stay of the proceedings on such terms and conditions as the court may think fit (*Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325).

[6] The judgment in the D5 suit was regularly obtained and the petition was presented by the petitioner who has the right to do so since the petitioner was the creditor of the respondent. The judgment debt is still a valid judgment and its execution has been stayed pending the appeal to the Court of Appeal. It is trite law that a judgment remains valid and enforceable until it is set aside. In *Patel Holding Sdn Bhd v Estet Pekebun Kecil Sdn Bhd & Anor* [1990] 2 CLJ 280, Wan Adnan Ismail J (as he then was) echoed the same sentiment when his Lordship said at p 281 of the report:

> In my view the judgment had been regularly obtained. A judgment remains regular and enforceable until it is set aside by the court. Although the plaintiffs had filed an application to set aside the judgment, the judgment remains regular and enforceable until it is set aside. Until the judgment is set aside the claim by the first defendant based on the judgment cannot be regarded as a disputed debt. It is in fact an enforceable judgment debt.

[7] Again, in *Bank Utama (Malaysia) Bhd v GKM Amal Bhd* [2000] 2 CLJ 525, Abdul Aziz Mohamad J (now JCA) aptly said at p 528 of the report:

> A judgment on the debt establishes in law that there is no *bona fide* dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal

against the judgment merely means that he still disputes the debt but does not establish that the debt is *bona fide* disputed. The judgment has already established the contrary.

[8] Thus, it is clear that winding-up proceedings can proceed until the judgment is set aside or where the judgment was obtained by fraud or collusion. That this is so is clearly reflected in the case of *Banfoong Sydney (M) Sdn Bhd v MIFC Credit & Leasing Sdn Bhd* [1990] 2 MLJ 120 where Zakaria Yatim J (as he then was) succinctly said at p 122 of the report:

> Applying the principles laid down in *Re Derrygariff Investments Pty Ltd* (1982) 1 ACLC 558; 6 ACLR 751 and *Re Gasbourne Pty Ltd* (1984) 2 ACLC 103; 8 ACLR 618 to the present case, the first question to consider is whether the judgment obtained in default of appearance against the plaintiff is a regular judgment or whether the judgment was obtained by fraud or collusion. If there is allegation that the judgment was obtained irregularly or obtained by fraud or collusion, the court has the discretion to go behind the judgment.

[9] So it can be surmised that the petitioner, having the right to file the petition and initiate these proceedings, should not now be prejudiced by the D5 stay order because that stay order was granted by the D5 court and it has no bearing to the current proceedings. I reiterate that the judgment in the D5 suit is a regular judgment until and unless it is set aside or if it was obtained by fraud or deceit. Presently there are no allegations that the judgment had been obtained by fraud or deceit and hence the judgment still stands. The present petition, having been based on the inability of the respondent to pay, should be allowed to subsist and to continue and this court should hear the petition forthwith.

[10] In regard to the respondent's counterclaim in the D5 suit, I have this to say. It is not in the nature of a set-off but rather it was an independent transaction which did not amount to a defence to the petitioner's claim **(***Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157, FC).

[11] Now, in the course of writing this judgment, I took into account the fact that the respondent had obtained the stay of execution of the judgment in the D5 suit as well as the argument that that judgment was no longer good for the purposes of levying execution. I too took into account that although a winding-up petition is not an execution, nevertheless, since it is based on a judgment which has since been stayed by the D5 Court, that judgment cannot be used as a foundation to support the petition. I also took into consideration the arguments that if the petition was founded purely on a demand then the position would be different and in such a situation the petitioner will have to show that the demand was not disputed and it was admitted by the respondent. All these arguments are certainly thought-provoking but they cannot prevent this court from hearing the present winding-up petition. The hearing of the winding-up petition must be heard by me and in the course of which I would certainly apply vigorously the rigours of s 221 of the Companies Act 1965. I look forward to the hearing of the present winding-up petition.

[12] For all these reasons, I would answer the issues posed in this way, that, notwithstanding the D5 stay order of execution of the judgment, the present winding-up petition which is founded on the judgment which has been stayed must be heard by me forthwith. There are no two ways about it.

Ordered accordingly.

Reported by AG Kalidas